3/27

No. 00-1109 (2)

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF OKLAHOMA

Petitioner,

v.

RAYMOND JOE WOOD

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

*COUNSEL OF RECORD

March 2001

QUESTION PRESENTED

1. Whether the Oklahoma Court of Criminal Appeals properly applied this Court's decision in **Brewer v. Williams**, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), in deciding that Respondent's Sixth Amendment right to counsel had been violated.

2. Whether the Oklahoma Court of Criminal Appeals properly applied findings of fact to well established legal precedent.

3. Whether the Oklahoma Court of Criminal Appeals' recommendation regarding waivers established a new rule of law or was merely *obiter* dicta.

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IN THE SUPREME COURT OF THE UNITED STATES

RAYMOND JOE WOOD,	)	
	)	
Respondent,	)	
	)	
v.	)	No. 00-1109
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Petitioner.	)	

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Comes now Respondent, by and through Katherine Jane Allen, Attorney for Respondent, and in response to Petitioner's Petition for Writ of Certiorari, states the following:

STATEMENT OF THE CASE

Raymond Joe Wood was charged on August 25, 1995, in Kay County District Court, Case No. CF-95-350, with indecent exposure after former conviction of two felonies. (O.R. 1-2) A jury trial was held on January 14, 1997, before the Honorable D.W. Boyd, District Judge. Mr. Wood was represented by Mr. O. Ronald McGee, Attorney-at-Law. The State was represented by Ms. Lisa Goodspeed Tate, Assistant District Attorney. The jury found Mr. Wood guilty as charged and recommended a sentence of 200 years and a fine of $10,000. (O.R. 140, 145) On February 19, 1997, judgment and sentence were imposed in accordance with the jury's recommendation. (O.R. 183-189)

A. THE POLYGRAPH EXAMINATION AND SUBSEQUENT INTERROGATION.

On August 25, 1995, Mr. Wood made his initial appearance before the District Court of Kay County, Oklahoma, on charges of indecent exposure. Thereafter, it was agreed that he would take a polygraph examination, which was to be conducted by Oklahoma State Bureau of Investigation's Agent Steve Tanio. (S. Tr. 9-10) Although Mr. Wood's attorney accompanied him to the polygraph examination, and even into the room where the exam took place, he was excluded from the session, as was the policy of the O.S.B.I. (S. Tr. 12, 24) Once the polygraph examination was completed and a break was taken, the authorities began to interrogate Mr. Wood in an effort to elicit a confession, which was ultimately obtained. (S. Tr. 18)

B. HOW THE QUESTION WAS PRESENTED ON DIRECT APPEAL.

In his Direct Appeal Brief-In-Chief, Respondent argued that the interrogation by Agent Tanio violated his right to counsel under the Sixth Amendment. Respondent explained that Mr. Wood and his attorney agreed to a polygraph examination, but never agreed to an interrogation outside the presence of counsel. Respondent analogized the facts of his case to **Brewer v. Williams**, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), wherein the police were allowed custody of a defendant for a specific purpose, but exceeded that purpose by attempting to secure a confession outside the presence of the defendant's attorney. In support of this assertion, Respondent argued that the O.S.B.I. agent was permitted to perform a polygraph examination outside the presence of Mr.

Wood's attorney. However, when he exceeded the limits of his agreement by initiating an interrogation, the resulting confession became inadmissible.

In addressing this claim, the Respondent distinguished the case relied upon by the prosecution at trial, **Wyrick v. Fields**, 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982). Respondent emphasized that the **Wyrick** opinion relied upon the fact that the defendant knew he could have the presence of counsel at any time, and that the turning off of the polygraph machine did not significantly change the nature of the questioning to which the defendant was subjected. Respondent explained that in Mr. Wood's case, the agent admitted that it was policy not to allow the attorney into the examination room, thus it could not be asserted that Mr. Wood knew he could have his attorney present at any time. Moreover, the nature of the questioning during the post-exam interrogation was also significantly different from the questioning that was part of the polygraph examination, because the examiner admitted that once the polygraph test was completed he began to employ interrogation techniques in an effort to elicit a confession.

Because the confession was obtained in violation of Respondent's Sixth Amendment right to counsel, Respondent reiterated his prayer for relief that the court reverse his conviction and sentence and remand his case for a new trial without the tainted evidence.

C. How The Question Was Disposed Of On Direct Appeal.

The Oklahoma Court of Criminal Appeals ruled in favor of Respondent's Proposition of Error on this issue. In its thorough examination of this issue, the court found that Respondent's Sixth Amendment right to counsel had been violated. **Wood v. State**, 11 P.3d 1249, 1250 (Okla.Crim.App. 2000). In so holding, the court noted three crucial factors.

First, the court began by noting that Mr. Wood's counsel accompanied him to the polygraph examination, but was excluded from the examination itself because O.S.B.I. policies prohibited his presence. **Id.** at 1250. Second, the court further noted that Mr. Wood and his attorney had agreed only to a limited interaction with the authorities outside counsel's presence, that is, a polygraph examination, not to a subsequent interrogation. The O.S.B.I. agent's decision to begin an interrogation with Mr. Wood exceeded the scope of the parties' agreement. **Id.** at 1251.

Lastly, the Court noted that pursuant to **Young v. State**, 670 P.2d 591 (Okla.Crim.App. 1983), Oklahoma state law generally holds that confessions obtained in anticipation of, during, or following a polygraph examination are admissible. **Wood**, 11 P.3d at 1251 n.2. However, the facts of Mr. Wood's case distinguished it from the general **Young** rule, because the confession was obtained in a new interrogation and exceeded the scope of the parties' agreed interaction between Mr. Wood and the authorities. **Wood**, 11 P.3d at 1251.

The Oklahoma Court of Criminal Appeals concurred with Respondent that **Brewer v. Williams**, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), was the controlling authority in this matter. The court explained its interpretation of **Brewer** to be that an individual against whom adversarial judicial proceedings have commenced has the right to legal representation during government interrogations; and the State has the burden of proving a knowing and intentional relinquishment or abandonment of that right. **Wood**, 11 P.3d at 1251. The state court further found that one cannot unintentionally waive one's Sixth Amendment right to counsel during government interrogation by merely agreeing to limited and specific contact with the police outside the presence of counsel. **Id.**

The court then applied **Brewer** to the facts of Mr. Wood's case. In so doing, the court found the factual circumstances of **Brewer**, wherein the defendant agreed to limited police contact outside the presence of counsel for the purpose of transportation, but not for purposes of questioning, to be identical to the circumstances of Mr. Wood's case, wherein the Respondent agreed to limited police contact outside the presence of counsel for the purposes of a polygraph examination, not for later questioning after the polygraph examination was concluded. **Id.**

Due to the fact that the authorities exceeded their agreement with Mr. Wood and his attorney, the state court found Mr. Wood's confession was obtained in violation of his Sixth Amendment right to counsel and was inadmissible.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI DOES NOT LIE WHERE THE DECISION OF THE OKLAHOMA COURT OF CRIMINAL APPEALS IS CONSONANT WITH THIS COURT'S SIXTH AMENDMENT RIGHT TO COUNSEL JURISPRUDENCE AND THE CASE RELIED UPON BY PETITIONER IS NEITHER LEGALLY NOR FACTUALLY CONTROLLING TO THE ISSUE BEFORE THIS COURT.

Petitioner relies on a case involving the Fifth Amendment's application to a single interrogation to justify why this Court should grant certiorari. However, Mr. Wood's conviction was reversed because of a Sixth Amendment violation which occurred when police interrogated Mr. Wood during the second of two contacts with police. Moreover, in Mr. Wood's Proposition of Error on direct appeal, this issue was argued exclusively as a Sixth Amendment issue. The Oklahoma Court of Criminal Appeals decided this matter solely upon Sixth Amendment grounds. In doing so, the state court correctly proclaimed and applied the applicable United States Supreme Court law for adjudicating Sixth Amendment claims. Due to the fact that the state court properly applied this Court's controlling authority to the issue that was before it and the case relied upon by the Petitioner as grounds for granting certiorari is neither legally nor factually relevant to the present case the writ should not be granted.

This Court's jurisprudence regarding the Sixth Amendment right to counsel has been well developed. The purpose of the Sixth Amendment right to counsel is to provide the defendant with legal assistance during the critical stages of the

criminal process. **Brewer v. Williams**, 430 U.S. 387, 398, 97 S.Ct. 1232, 1239, 51 L.Ed.2d 424 (1977); **Powell v. Alabama**, 287 U.S. 45, 57, 53 S.Ct. 55, 59-60, 77 L.Ed. 158 (1932). To give effect to this protection, this Court has required that the State deal with a defendant through his attorney. Police attempts to deliberately elicit incriminating information from a defendant after his right to counsel has attached and absent a valid waiver of counsel will violate the Sixth Amendment. **United States v. Henry**, 447 U.S. 264, 273 n.11, 100 S.Ct. 2183, 2188 n.11, 65 L.Ed.2d 115 (1980); **Massiah v. United States**, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

The Petitioner's argument is that certiorari should be granted because the Oklahoma Court of Criminal Appeals' adjudication of this case is contrary to this Court's decision of **Wyrick v. Fields**, 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982). However, this conflict is, in fact, nonexistent, as **Wyrick** was argued and decided solely upon Fifth Amendment grounds. The Oklahoma Court of Criminal Appeals decided Mr. Wood's case solely upon Sixth Amendment grounds, after determining that **Brewer** was the controlling authority and **Wyrick** was inapplicable. **Wood v. State**, 11 P.3d 1249, 1251 (Okla.Crim.App. 2000).

This Court, in **Wyrick**, made it abundantly clear that the Fifth Amendment to the United States Constitution, which protects against compulsory self-incrimination, was the governing amendment and that the Sixth Amendment was inapplicable to the issue. This Court stated:

> According to the dissent, a substantial question as to the admissibility of Fields' statements may be raised under the Sixth Amendment. **Post**, at 398-400. The Sixth Amendment issues raised by the dissent, however, are not before us. The Court of Appeals rested its judgment exclusively on the Fifth Amendment 'right to have counsel present during a custodial interrogation' and on its interpretation of this Court's decision in **Edwards**. 682 F.2d at 158. That interpretation was flawed and the judgment of the Court of Appeals must be reversed. We express no view as to whether any constitutional safeguards not mentioned by the Court of Appeals bear on this case.

459 U.S. at 49.

In addition to the fact that **Wyrick** is not legally controlling in Mr. Wood's case, it is also factually inapplicable. The factual basis for the opinion of the state court was that Mr. Wood was subjected to two separate incidents, not a single interrogation. **Wood**, 11 P.3d at 1250-51. Whereas in **Wyrick** this Court struck down a decision by the Eighth Circuit Court of Appeals that had fashioned a rule requiring that "police again must advise the suspect of his rights before questioning him **at the same interrogation** about the results of the polygraph." **Wyrick**, 459 U.S. at 48 (emphasis added).

Petitioner's request for certiorari seeks to impose this Court's Fifth Amendment jurisprudence to an issue which was argued and decided exclusively upon the Sixth Amendment right to counsel grounds. The Sixth Amendment is the only relevant constitutional amendment at issue here and the Oklahoma Court of Criminal Appeals properly applied that amendment in this case. Almost thirty years ago, in **Kirby v. Illinois**, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), this Court refused to do precisely what the Petitioner is requesting of it

now - to apply a decision based solely upon the Fifth Amendment to a Sixth Amendment claim. In declining to do so this Court stated, "Unless all semblance of principled constitutional adjudication is to be abandoned . . . it is to the decisions construing [the Sixth Amendment] that [this Court] must look in determining the present controversy." **Kirby**, 406 U.S. at 688.

In conclusion, Petitioner's writ of certiorari should be denied because the state court properly applied this Court's Sixth Amendment jurisprudence to the right to counsel issue which was before it. Moreover, the case upon which Petitioner relies as grounds for certiorari is neither legally relevant, as it concerns the Fifth Amendment, nor is it factually relevant, as it concerns a single interrogation.

II.

CERTIORARI DOES NOT LIE WHEN THE CASE INVOLVES NOTHING MORE THAN PETITIONER'S DISAGREEMENT WITH THE OKLAHOMA COURT OF CRIMINAL APPEALS FACTUAL FINDINGS.

The Oklahoma Court of Criminal Appeals made the factual determination that the interrogation in question occurred after the polygraph exam was concluded. **Wood**, 11 P.3d at 1250. This conclusion was well supported by the record. The court then held that by interrogating Mr. Wood after the polygraph exam was concluded "the police exceeded their agreement with Wood and his attorney and Wood's confession in inadmissable." **Id.** at 1251.

Petitioner does not argue that once police secure an agreement to conduct a polygraph examination, police are then allowed free reign to interrogate a defendant at any subsequent time outside the presence of counsel. Therefore, Petitioner's argument is nothing more than a factual disagreement over whether the polygraph examination had concluded and a separate interrogation had begun, or whether the interrogation was part of the polygraph examination to which Mr. Wood and his attorney had agreed. Such a factual disagreement will rarely justify the granting of a writ of certiorari. **See** Rule 10, Supreme Court Rules.

There can be no doubt that the factual determination regarding the timing of the interrogation was a central element of the state court's opinion. This can be seen in the state court's Order Denying Petition for Rehearing, filed October 10, 2000, by the Oklahoma Court of Criminal Appeals. (Petition for writ of certiorari at App. 31-33) Two judges dissented from the denial of rehearing, and one of those judges, Judge Steve Lile stated, "I would grant rehearing because the Court's opinion relies upon a misstatement of the facts." (Petition for writ of certiorari at App. 33) Accordingly, there can be no question that the crux of the state court's opinion involves a factual determination that differing parties may view in conflicting ways. This Court rarely grants certiorari to resolve such factual disputes. **See** Rule 10, Supreme Court Rules.

There was sufficient evidence to support the state court's findings of facts in this case. The officer who examined Mr. Wood testified that after the exam he

told Mr. Wood that he thought Mr. Wood was being deceptive and then "went from there into an interrogation." (S. Tr. 14) He described using "interrogation techniques" with Mr. Wood. (S. Tr. 18-19) He also testified as follows:

> Q. You stopped the polygraph and you immediately then began a custodial interrogation of the defendant, is that right?
>
> A. Basically, a short break.

(S. Tr. 22)

From this evidence, the Oklahoma Court of Criminal Appeals was justified in finding that the polygraph examination had ended, that an interrogation had begun, and therefore police had exceeded the scope of their agreement with Mr. Wood and his attorney. Petitioner's disagreement and dissatisfaction with these findings of facts is not sufficient reason to justify granting the writ requested.

III.

CERTIORARI DOES NOT LIE WHERE THE OKLAHOMA COURT OF CRIMINAL APPEALS BOTH DECLINED TO FASHION A MANDATORY NEW RULE REGARDING THE WAIVER OF THE RIGHT TO COUNSEL, AND DID NOT CLEARLY STATE WHETHER ITS DISCUSSION OF THAT ISSUE WAS BASED UPON THE OKLAHOMA STATE CONSTITUTION OR UNITED STATES CONSTITUTION.

Petitioner claims that the Oklahoma Court of Criminal Appeals established a new rule requiring that a waiver of counsel be executed prior to a polygraph exam being conducted, and that this rule is similar to the rule struck down in **Wyrick**. Specifically, Petitioner alleges the following:

> The rule fashioned by the Oklahoma Court of Criminal Appeals is that for an informed waiver law enforcement must disclose the

> complete parameters of the polygraph examination prior to testing and adhere strictly to those parameters. The Oklahoma Court of Criminal Appeals' rule is like the rule condemned in **Wyrick** as an "unjustifiable restriction on reasonable police questioning" as it fails to recognize that there is one instigation and one interrogation.

(Petition for writ of certiorari at 12-13). However, a careful reading of the state court's opinion reveals Petitioner's claim is incorrect for two reasons. First, it is clear that no new rule was established by the Oklahoma Court of Criminal Appeals, rather the court only suggested, in *obiter* dicta[1], a procedure which police are not obligated to follow. Second it is not clear whether the state court based this section of the opinion upon Oklahoma state law or the United States Constitution. Therefore, Petitioner's assertion that a writ of certiorari must be granted to correct the state court's erroneous implementation of a new rule of constitutional law which conflicts with this Court's jurisprudence is erroneous.

To begin with, the particular language that Petitioner complains of does not establish a new rule. In fact, it is better described as dictum, or as "[b]road language in [the] case that is not necessary to the court's decision [and thus] is not binding authority." **Kastigar v. United States**, 406 U.S. 441, 454-55, 92 S.Ct. 1653, 1662, 32 L.Ed.2d 212 (1972). In arguing that the state court has crafted a new rule, Petitioner failed to note the first relevant sentence regarding

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[1] *Obiter* dicta is generally "considered to be expressions in a court's opinion which go beyond the facts before the court and therefore are the individual views of the author of the opinion and not binding in subsequent cases." **Foster v. Naftalin**, 74 N.W.2d 249, 266 (Minn. 1956).

this issue, which establishes its advisory nature. The state court's opinion on this point reads in its entirety as follows:

> Wood agreed to a polygraph exam outside the presence of counsel but not to post-exam interrogation without counsel. Wood's consent was limited and his counsel should have been presented for any questioning following the conclusion of the polygraph exam absent a waiver. The accused and his attorney **should** execute a waiver of the right to counsel prior to a polygraph exam. [FN8] For an informed waiver, law enforcement must disclose the complete parameters of the polygraph examination and any statements obtained outside the scope of the waiver are inadmissible. Here, the police exceeded their agreement with Wood and his attorney and Wood's confession is inadmissible.
>
> > FN8. To provide a clear record, it would be a **better practice** to have a written waiver.

Wood, 11 P.3d at 1251 (emphasis added).

The use of the word "should" rather than the mandatory "shall" or "must," and the use of the term "better practice" clearly indicates that the state court is not mandating any particular practice. While the use of the word "must" is used in explaining what is needed to constitute a valid waiver, the waiver itself is not mandated by the opinion.

In such an instance, where there is broad, *obiter* dicta, unnecessary to the court's decision and not binding on subsequent cases, it cannot be said that a grant of certiorari is appropriate. This Court has repeatedly stated that its duty "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the

case before it." **Local No. 8- -6, Oil Chemical and Atomic Workers Intern. Union v. Missouri**, 361 U.S. 363, 367, 80 S.Ct. 391, 394, 4 L.Ed.2d 373 (1960); **Mills v. Green**, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895). As the language in Wood is *obiter* dicta is not binding precedent. Accordingly, it cannot give rise to any actual controversy which this Court must resolve. Additionally, any opinion of the Supreme Court on this issue would be merely advisory, since it would have no effect on this case.

Secondly, Petitioner alleges that certiorari should be granted "because the Oklahoma Court of Criminal Appeals has impermissibly attempted through its Woods ruling to add to the mandates of the United States Constitution." (Petition for writ of certiorari at 13). This is inaccurate as it is unclear whether the complained of portion of the opinion was based upon state or federal law. The Oklahoma Court of Criminal Appeals did discuss the legal basis for its opinion in paragraphs five and six. **Id.** In those two paragraphs, the court cites seven times to three different cases. **Id.** However, the court cited no legal authority in paragraph seven, the paragraph in which the complained of language appears. **Id.** The court does not indicate whether its statement was based upon state or federal constitutional law and does not make clear whether the language complained of involves a federal issue. **Id.**

In conclusion, the state court did not promulgate an erroneous rule regarding waivers. Rather the state court's writing on this issue was superfluous to the opinion. Moreover, it cannot be ascertained whether this broad language

was even based upon federal constitutional law. Accordingly, it does not provide grounds to grant certiorari.

CONCLUSION

For the foregoing reasons, this Court should decline to grant certiorari to review the issues presented by Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Katherine Jane Allen, a member of the Bar of this Court, hereby certifies that 1 copy of the foregoing was mailed by first-class, postage prepaid mail, to the counsel for Petitioner:

Office of the Attorney General
112 State Capitol
2300 N. Lincoln Blvd.
Oklahoma City, Oklahoma 73105-4894

Katherine Jane Allen
KATHERINE JANE ALLEN
ATTORNEY FOR RESPONDENT

Dated: March 27, 2001

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Respondent.

AFFIDAVIT OF MAILING

STATE OF OKLAHOMA)
) ss.
COUNTY OF CLEVELAND)

Katherine Jane Allen, being first duly sworn, states:

1. That I am attorney of record the above-styled case representing the State of Oklahoma and am a member of the Bar of this Court.

2. Pursuant to Rule 29.2 of the Rules of this Court, on March 27, 2001, at approximately 5:00 p.m. Central Standard Time, I caused to be placed 11 copies of the Respondent's Brief in Response to Petition for a Writ of Certiorari in a package properly addressed to the Clerk of this Court, with postage prepaid, and caused the package to be placed in the United States Mail in Norman, Oklahoma.

FURTHER AFFIANT SAYETH NOT.

Katherine Jane Allen
KATHERINE JANE ALLEN

Subscribed and sworn to before me this 27th day of March, 2001.

Nancy L McGee
Notary Public

My Commission Expires: 09-05-04

NOTARY PUBLIC SEAL
NANCY L. McGEE
Cleveland County
Notary Public in and for
State of Oklahoma
My commission expires 09-05-04